RECORD OF COMMUNICATION

[x] PHONE CALL [ ] DISCUSSION [ ] FIELD TRIP [ ] CONFERENCE [ ] OTHER (SPECIFY)

(Record of item checked above)

TO: Minette Hawlett

FROM: R L O'Connell

DATE: 9/4/73

TIME:

SUBJECT: Permit Program

File 815.4

SUMMARY OF COMMUNICATION

I called Minette to follow-up on PDF's recent conversations in Hawaii regarding more State participation in the permit program. I propose to Minette that they select a total of [illegible] dischargers from the October portion of our [illegible] list which we could & try to draft permits which we could review with them & hopefully issue. He is having a staff meeting later this week to explain what they can do along these lines. He feels that they can't do much until they get more staff in a few months.

They will probably not submit an application for program approval by 9/30 as scheduled but will sometime in October.

They're still waiting for comments from EPA on their Chap 37, 37-A as required for public hearings, especially on the subject of zones of mixing. I said I'd look into it.

CONCLUSIONS, ACTION TAKEN OR REQUIRED

Walter - find out who is reviewing Chap 37, & 37-A & when response should be mailed.

INFORMATION COPIES TO: PDF, Reg Counsel, Walter, Pierce

EPA Form 1300-6 (7-72) REPLACES EPA HQ FORM 5300-3 WHICH MAY BE USED UNTIL SUPPLY IS EXHAUSTED.

UNITED STATES GOVERNMENT

Memorandum

Regional Counsel Opinion No. 167
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

TO : R. L. O'CONNELL, Director
Enforcement Division 302

DATE: September 29, 1973

FROM : CASSANDRA DUNN, Regional Counsel

SUBJECT: Review of Public Health Regulations, Department of Health, State of Hawaii, Chapter 37 Final Draft August 16, 1973 and Chapter 37-A, Final Draft August 16, 1973.

We have compared Chapter 37 Draft of August 16, 1973 with the material previously contained in Chapter 45 and observed changes in the following provisions:

1(a)(2), 1(d)(2), 1(u), 1(v), 1(x), 1(y), 2, 3, 4(e)(2), 14(b)(3), 15(a)(1), 21(a)(1)(iii), 30(a), and 36.

In our previous evaluations of Hawaiian authority (June 7, 1973 and July 24, 1973) the effect of Chapter 37-A was not considered. We herein consider the effect which the August 16, 1973 drafts of Chapters 37 and 37-A have on our prior evaluations of Hawaii's authority.

The entry numbers contained below refer to the entries contained in our earliest evaluation.

Entry No. 1: Previous conclusions basically unchanged.

Entry No. 2: Previous conclusions basically unchanged.

Entry No. 3: Previous conclusions basically unchanged. Regarding the questionable nature of specific authority for Section 403 see the letter to Nelson Chang from Cassandra Dunn dated September 28, 1973. Note that Chapter 37, Sectin 15(a)(1) differs from the corresponding provision in Chapter 45 thusly:

Chapter 45: "The Director shall approve an NPDES application for a NPDES permit if . . . (a) the existing treatment works or waste outlet is designed, built, and equipped in accordance with the best practicable control technology so as to eliminate or reduce wastes to a minimum." (emphasis added)

Chapter 37: The underlined words above, "eliminate or" are deleted.

The elimination of waste discharge is the national goal of the FWPCA 1972 (Sec. 101(a)(1)). It would seem that if best practicable control technology could eliminate wastes, it would be required to do so. We hope that the deletion of "eliminate" does not reflect an attitude which would not require the elimination of wastes if such is a result of the best practicable control.

Entry No. 4: Previous conclusions basically unchanged.

Entry No. 5: Previous conclusions basically unchanged.

Entry No. 6: Previous conclusions basically unchanged.

Entry No. 7: Previous conclusions basically unchanged.

Entry No. 8: Previous conclusions basically unchanged.

Entry No. 9: Previous conclusions basically unchanged.

Entry No. 10: Previous conclusions basically unchanged. See letter from Cassandra Dunn to Nelson Chang dated September 28, 1973.

Entry No. 11: Previous conclusions basically unchanged.

Entry No. 12: Previous conclusions basically unchanged.

Entry No. 13: Previous conclusions basically unchanged.

Entry No. 14: Previous conclusions basically unchanged.

Entry No. 15: Previous conclusions basically unchanged.

Entry No. 16: Previous conclusions basically unchanged.

Entry No. 17: Previous conclusions basically unchanged.

Entry No. 18: Previous conclusions basically unchanged.

Entry No. 19: Previous conclusions basically unchanged.

Entry No. 20: Previous conclusions basically unchanged.

Entry No. 21: Previous conclusions basically unchanged.

Entry No. 22: Previous conclusions basically unchanged.

Entry No. 23: Previous conclusions basically unchanged.

Entry No. 24: Previous conclusions basically unchanged.

Entry No. 25: Previous conclusions basically unchanged.

Entry No. 26: Previous conclusions basically unchanged.

Entry No. 27: Previous conclusions basically unchanged. Regarding the authority to meet the requirements of 40 CFR 124.73(f) and (g) see the letter from Cassandra Dunn to Nelson Chang dated September 28, 1973.

Entry No. 28: Previous conclusions basically unchanged.

Entry No. 29: Previous conclusions basically unchanged.

Entry No. 30: Previous conclusions basically unchanged.

Entry No. 31: Previous conclusions basically unchanged. See the letter from Cassandra Dunn to Nelson Chang dated September 28, 1973.

Entry No. 32: Previous conclusions basically unchanged.

Entry No. 33: See the letter from Cassandra Dunn to Nelson Chang dated September 28, 1973. Previous conclusions basically unchanged.

Cassandra Dunn

CASSANDRA DUNN

Encl:
Letter from C. Dunn to N. Chang
dated September 28, 1973

Note: this is a Regional review only and is subject to EPA Washington concurrence.

September 28, 1973

Re: NSWC:mm

Nelson S. W. Chang
Deputy Attorney General
State of Hawaii
Hawaii State Capitol, 4th Floor
Honolulu, Hawaii 96813

Dear Mr. Chang:

The following are our comments to your comments of August 21, 1973 on our comments of July 24, 1973 on Chapter 45 (now Chapter 37 and hereafter so called) Public Health Regulations, Department of Health, State of Hawaii.

Regarding the points raised in your second paragraph: You have asked what we mean in stating that specific authority is questionable with regard to the requirements of Section 403 FWPCA. By this statement we mean that the regulations which we reviewed do not specifically authorize control over discharge to ocean waters. Because Chapter 342 H.R.S. does grant broad powers to the Director to make rules and regulations controlling and prohibiting water pollution (Section 3, Act 200) it is likely that Hawaii has authority to assure compliance with Section 403 FWPCA 72. However, as we did not find a specific regulation indicating this exact authority, we felt it advisable to put you on notice that this specific authority is lacking.

As you know, Section 402(b) FWPCA 72 requires a statement from the Attorney General that the laws of his State provide adequate authority to carry out the permit program. If you believe adequate authority is provided in Chapter 342 H.R.S. (or elsewhere) to control Ocean Discharges please so state in the Attorney General's certification along with any elucidation you feel is relevant.

You also comment in your second paragraph that: "This (absence of specific mention in Chapter 37 of the guidelines promulgated by the Director relating to Ocean Discharges) is of little significance at this juncture in time since under Section 402(d) . . . no permit may issue if the Administrator objects to the issuance of such permit." We are confused by your reference to "this juncture in time." However the existence of the Administrator's veto cannot confer a permit program on a state which is otherwise lacking this proper legal authority.

Regarding the points raised in your third paragraph: Again, the powers bestowed by Chapter 342 H.R.S. are very broad and seem to grant the necessary authority. Our July 24th evaluation as "questionable" was based in part in fear that the principal of inclusio unius exclusio alterius might be at work in the passing of Section 22(b). Specifically, we were concerned that the Department only sought power to inspect premises of permittees and was not looking for power (or had overlooked the need for power) to inspect discharges not yet under permits.

As with other similar problems, explanations contained in the Attorney General's certification will hopefully eliminate any of our uncertainty about adequacy of authority.

Regarding the points raised in your fourth paragraph: If Chapter 376of the regulations isiissued pursuant to Part III of Chapter 342 H.R.S. then Section 342(11)(b) H.R.S. will provide adequate authority to meet the requirements of 40 CFR 124.73(f). Explanation can be provided in the Attorney General's certification.

Regarding the points raised in your fifth paragraph: The following comment to 40 CFR 124.73 is relevant.

> "(Comment. It is understood that in my States the Director will be represented in State courts by the State attorney general or other appropriate legal officer. While the Director need not appear in court actions under this subpart, he should have the power to request that such actions be brought.
>
> "The following enforcement options, while not mandatory, are highly recommended as means not only for compelling compliance but also for providing additional funds to State or interstate program efforts:
>
> "(1) Procedures for assessment by the Director or by a State court of any violator for the costs of an investigation, inspection, or monitoring survey which led to the establishment of the violation;

"(2) Procedures which enable the Director to assess or to sue any persons responsible for an unauthorized discharge of pollutants for any expenses incurred by the State in removigg, correcting, or terminating any adverse effects upon water quality resulting from such unauthorized discharge of pollutants, whether or not accidental; and,

"(3) Procedures which enable the Director to sue for compensation for any loss or destruction of wildlife, fish or aquatic life, and for any other actual damages caused by an unauthorized discharge of pollutants, either for the State, for any residents of the State who are directly aggrieved by the unauthorized discharge of pollutants or both.)"

Again, in the Attorney General's certification, elaboration on this point should be made.

Regarding the points raised in your sixth paragraph: Authority to meet the requirements of 402(h) FWPCA 72 seems to be contained within the Sections you cite. In using the phrase "authority vague," we refer to the fact that neither the statutes nor the regulations contain a provision substantially similar to 402(h) FWPCA 72. The authority is vague in the sense that it does not specifically deal with the subject matter of 402(h) FWPCA 72.

Regarding the points raised in your seventh paragraph: This issue seems to be moot as you indicate that the Department does not desire to have the relevant authority.

Regarding the points raised in your eighth paragraph: We, too, hope that no roadblocks will exist to Hawaii's obtaining EPA approval for NPDES permit authority. Perhaps the best way to insure a thoroughlunderstanding of the scope of Hawaii's statutes and regulations is to prepare a detailed and thorough, but concise elaboration of how Hawaii's scheme meets Federal requirements. This material would be submitted with the Attorney General's certification under Section 402(b) of the FWPCA 1972. As an indication of the importance which EPA places on the Attorney General's statements let us quote to you a paragraph from a memo to: All Regional Counsel; FROM: The Acting Deputy General Counsel; Subject: Statements of Attorney's General Under Section 402(b) of the Federal Water Pollution Control Act; dated September 11, 1973.

"The importance of these statements in determining whether the State has the authority required by Section 402(b) of the Act and by EPA's State Program Guidelines cannot be overemphasized. A well-written statement can illuminate unclear statutory language, explain constitutional requirements, apply rules of construction under State law, and direct the reviewer to the precise statutes, regulations, and judicial decisions which support the authorities cited in the form for use in preparing Attorney General's Statements which was forwarded to the Regional Administrators on March 28, 1973, by the Assistant Administrator for Enforcement and General Counsel. Such a statement can greatly facilitate review and, if possible, approval of State programs."

Regarding the points raised in your ninth paragraph: Chapter 37A of the Public Health Regulations establishes classifications of water uses, zones of mixing, classification of water areas, water quality standards, and procedures for establishment, renewal and termination of zones of mixing. The "lowest" (in the sense of being least stringently controlled) classification of coastal waters are those denoted as Class "B", the middle designation for coastal waters is Class "A", the lowest fresh waters are designated Class "2."

Class A waters are defined in Section 3(A)(2):

"The uses to be protected in this class of waters are recreational[,] (including fishing, swimming, bathing and other water-contact sports) [and] , aesthetic enjoyment [.] and the support and propagation of aquatic life.

"It is the objective for this class of waters that their use for recreational purposes and aesthetic enjoyment not be limited in any way. Such waters shall be kept clean of any trash, solid materials or oils and shall not act as receiving waters for any effluent which has not received the best [practicable] degree of treatment or control practicable under existing technology and compatible with the standards established for this class."

Class B waters are defined in Section 3(a)(3):

"The uses to be protected in this class of waters are small boat harbors, commercial [.] and industrial shipping, bait fishing, compatible recreation, the support and propagation of aquatic life, and aesthetic enjoyment.

"It is the objective for this class of waters that discharges of any pollutant be controlled to the meximum degree possible and that sewage and industrial effluents receive the best practicable treatment or control compatible [for] with the standards established for this class.

"The Class B designation shall apply only to a limited area next to boat docking facilities in bays and harbors. The rest of the water area in such bay or harbor shall be Class A unless given some other specific designation in Section 5."

Class 2 waters are defined:

Class 2 waters are defined in Section 3(B)(2):

"The uses to be protected in this class of waters are bathing, swimming, /recreation, growth and propagation of fish and other/ the support and propagation of aquatic life, compatible recreation and agricultural and industrial water supply.

"It is the objective for this class of waters that their use for recreational purposes, propagation of fish and other aquatic life and agricultural and industrial water supply not be limited in any way. Such waters shall be kept clean of trash, solid materials or oils and shall not act as receiving waters for any effluent which has not received the best practicable treatment compatible with the standards established for this class."

No waste discharges are permitted into Class "1" waters (the higher classification for fresh waters). No zones of mixing are permitted in Class "AA" waters (the highest classification for coastal waters).

Both Class "B" and Class"2" waters require effluents to receive "the best practicable treatment compatible with the standards established for (the) class." Class "A" waters require effluents to receive "the best degree of treatment or control practicable under existing technology and compatible with the standards established for this class.

Section 402(b) of the FWPCA 1972 requires states to have adequate authority to issue permits which apply, and insure compliance with, any applicable requirements of Sections 301, 302, 306, 307 and 403. Merely possessing "adequate authority" is insignificant if a state does not intend to comply with the requirements of the enumerated sections.

To examine the consistency of the Hawaiian classification and system with P.L. 92-500 let us review as an example the requirements of Section 301. In order to insure compliance with Section 301 Hawaii must meet the following requirements:

1) Not later than July 1, 1977, effluent limits for point sources, other than publicly owned treatment works(i) which shall require the application of the best practicable control technology currently available as defined by the Administrator . . . or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph(B). . . which shall require compliance with any applicable pretreatment requirements and any requirements under Section 307 of this Act [Section 301(b)(1)(A)] (emphasis added).

2) For publicly owned treatment works in existence on July 1, 1977 or approved pursuant to Section 203 . . . prior to June 30, 1974 . . . effluent limitations based upon secondary treatment as defined by the Administrator . . . [Section 301(b)(1)(B)] (emphasis added).

3) Not later than July 1, 1977, any more stringent limitation . . . [Section 301(b)(1)(C)].

4) Not later than July 1, 1983, effluent limitations for categories and classes of point sources other than publicly owned treatment works which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward . . . eliminating the discharge of all pollutants . . . or (ii) for pollutants introduced into publicly owned treatment works, compliance with requirements under Section 307 [Section 301(b)(2)(A)].

5) Not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in Section 301(g)(2)(A) of the Act [Section 301(b)(2)(B)].

We submit that inherent in the criteria for Classes "A," "B," and "2" waters are potentially significant conflicts with the requirements of Section 301. Thus e.g., "the best practicable treatment compatible with the standards established for Class 'B'" (the criterion for Class "B" under Section 3(A)(3) of Section 37-A) is not necessarily "the best practicable control technology currently available as defined by the

Administrator" (Section 301(b)(1)(a)) or "the best available technology economically achievable" (Section 301(b)(2)(A)). It would seem that the latter two levels of control could or would require more stringent treatment than Hawaii would require for Class "B" waters. As no limitation is placed on the nature of the waters to which the federal standards are applied, when the dates for applying these standards occur, irreconcilable conflicts would exist with Hawaii's standards for Class "B" waters. The conflicts between Section 301 and the Hawaiian classification system are indicative of the nature of the anticipated inconsistencies between the classification system as presently defined and the other requirements of the FWPCA 1972.

Objections which EPA may have to a "zone of mixing" concept are similar to objections to the classification of waters system discussed above. The mixing zone concept per se is not objectionable. All effluents returning to streams are in effect creating "zones of mixing" in the vicinity of the point of return. However, as presently defined the "zone of mixing" is susceptible to conflicts with federal requirements. Thus Section 7(d)(4) of Chapter 37-A states:

> "No zone of mixing shall be granted . . . unless: The discharge occurring or proposed to occur does not violate the basic standards applicable to all waters, will not unreasonably interfere with any actual or probable use of the water areas for which it is classified, and has received the best practicable treatment or control or, in the case of a proposed discharge, will receive the best available demonstrated pollution control technology, processes, and operating methods."

The conflicts of the "best practicable treatment" concept with the requirements of Section 301 are discussed above. The concept of "best available demonstrated pollution control technology, processes and operating methods is so broad one might first consider it free from conflict with FWPCA requirements. Yet, even here potential inconsistencies exist. E.g., in a portion of Section 301(b)(2)(A) which was not quoted above, it is stated that the application of best available technology economically achievable required by July 1, 1983 may "require the elimination of discharges of all pollutants if the Administrator finds . . . that such elimination is technologically and economically achievable for a category or class of point sources . . ." We submit

that the Hawaiian concept of "best availhble demonstrated pollution control technology" may not be the functional equivalent of "the elimination of discharges of all pollutants." If this inconsistency did develop an irreconcilable conflict would exist between the Hawaiian standard and the federal requirement.

It is of course notable that Section 7(j) of 37-A provides that "the establishment of any zone of mixing shall be subject to the concurrence of the federal (EPA)." Thus the argument can be made that EPA will not concur in establishing any mixing zone which conflicts with federal requirements, therefore no practical harm is done by the definition of mixing zone as it now stands. However, a situation where EPA is nessarily systematically denying requests (due to irreconcilable statutory-regulatory conflict) by Hawaiian citizens applying for privileges established by Hawaiian law is not a situation which would be pleasing to the Hawaiian government, the federal government or the Hawaiian citizenry. It would seem advisable to eliminate such potential long term conflicts before they begin.

Sincerely,

/s/ Cassandra Dunn

CASSANDRA DUNN,
Regional Counsel

Reading File
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